UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtors.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York 10004

December 17, 2018

3:02 PM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Hearing re: Conference re: Objection to Claim Number 29606 Filed by SRM Global Master Fund Limited Partnership [ECF No. 53215]

Transcribed by: Nicole Yawn

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P R O C E E D I N G S

THE COURT: Please, have a seat.

MR. LEVINE: Thank you, Your Honor.

THE COURT: So thanks for coming in. I thought it was time that we get back together again. You tried to settle this, and you failed.

MR. LEVINE: That's correct, Your Honor.

THE COURT: And since we were last together, Judge Abrams, in the District Court, issued a decision in the Maverick case.

MR. LEVINE: That's correct.

THE COURT: And I wanted to, among other things, ask for your impressions with that regard to whether or not that decision is ultimately upheld on appeal, what your view was of the impact of certain of the statements that Judge Abrams. There are, of course, distinctions between the two cases. Maverick involved what I call the spoke guarantee, not a proper resolution, and -- well, won't give you the rest of my thoughts.

But why don't I start with asking each of you to tell me how you think Judge Abrams' decision in Maverick bears on what I have before me, with respect to the SRM claims?

MR. LEVINE: Very good, Your Honor. Rick Levine and Garrett Fail, and Agustina Berro, for Lehman, from Weil,

Gotshal. We think that the 562 ruling, though we don't agree with the Court's -- Judge Abrams' construction of 562, --

THE COURT: Insofar as its inapplicability to an agreed termination?

MR. LEVINE: Correct, Your Honor.

THE COURT: Okay.

MR. LEVINE: Obviously, following her ruling, which she said 562 did not apply to Maverick, for that very reason, because there was no unilateral contractual termination. The termination that took place was years in advance, and it was mutual, under the settlement agreement. She said that 562 applies when there's a unilateral contractual right to terminate and it's exercised. That's what we have here.

SRM, unlike Maverick, because SRM was under the English LBIE version of the Prime Brokerage Agreement.

THE COURT: Right.

MR. LEVINE: Unlike Maverick, which was under a U.S. law, LBI version. Maverick -- I'm sorry -- SRM did have a unilateral contractual right to terminate, in the event of an event of default, and the filing for administration by LBIE was an act of insolvency, under the PBA. SRM sent a notice of event of default and then same day, sent a termination letter, which was an exhibit to our

objection. It was Tab F of the binder.

So applying Judge Abrams' ruling, clearly, 562 applies here, because there was unilateral contractual right to terminate. They did terminate. It was early in the case. It was in November of 2008.

It gave them certainty that Judge Abrams said was central of 562. So on that basis, we think it helps us, if anything, because it reinforces when 562(a) applies, and it applies here. Now, that said, as Your Honor will remember, we don't think it matters whether you value these guarantee claims at issue under --

THE COURT: Under -- right.

MR. LEVINE: -- 502.

THE COURT: Because it's all less than what the claim would have been, right?

MR. LEVINE: Well, it's a lot less than they ultimately got paid by LBIE.

THE COURT: Right.

MR. LEVINE: On the termination date, the claim was worth -- the segregated assets claim was worth 34 million. On the petition date, it was worth 52 million, and they got 220 million ultimately from LBIE.

The second part of Judge Abrams' decision --

THE COURT: Yes.

MR. LEVINE: -- had to do with the exculpation

clauses.

THE COURT: Yes, and the exculpation clause in this case in SRM, I believe -- at least it's your position -- that it's broader than the exculpation clause in the Maverick agreement.

MR. LEVINE: Yes, Your Honor, I even put slides together, if you're interested.

THE COURT: Sure.

MR. LEVINE: Thank you. Approach the bench. But, yes, that is exactly our position, that it's much broader language.

THE COURT: Thank you.

MR. LEVINE: So in Maverick, there were two provisions. The first one is the indented part of the first --

THE COURT: Right.

MR. LEVINE: -- page of the slides. And it was, "You agree that Lehman Brothers would not be liable for any lost caused directly, indirectly by government restrictions, exchange, or market ruling, suspension of trading, and other things beyond Lehman Brothers' control?" And what she said is that, "The filing for administration was not something beyond Lehman Brothers' control." Now, we disagree with that, but we don't think that has any applicability, right or wrong, to the exculpation provisions under the SRM PBA.

Similarly, on the second page of the slides, we have the second of the Maverick exculpation provisions, and Judge Abrams said that the language, "Lehman Brothers shall not be liable in connection with the execution, clearing, handling, purchasing, or selling of securities or other actions, except for gross negligence or willful misconduct on Lehman Brothers' part." Just dealing with that part of it, she said well, this was they didn't return assets, so it's not covered. Now, again, if I was in front of her and arguing, I would say it's all about handling of assets, other action. Of course, it's covered, but again, it doesn't matter, because that's not the language found in the SRM then.

And finally, the last sentence of the Maverick exculpation provision -- as far as I can tell, Judge Abrams just didn't focus on, because it says, "In no event will Lehman Brothers be liable for any special, indirect, incidental, or consequential damages," and as far as I can recall, she didn't mention that provision, and I don't really understand why she felt that that sentence was subject to the first sentence, when it said, "In no event." But in any event, that was her ruling, but we don't think it applies here.

In here in SRM, we have very different provisions. Language just is not the same. So 1404 expressly limits

Lehman's liability, and it expressly says includes affiliates. So where it refers to the prime broker, 14.9 says that includes all affiliates of the prime broker.

It limits Lehman's liability to instances of gross negligence, fraud, or willful default or breach and precludes damages based on any special circumstances, indirect or consequential losses, or subsequent variations to the market values of the relevant cash or security. Now, you know our argument. We believe that's directly applicable here, but --

THE COURT: Right.

MR. LEVINE: -- putting aside how it relates to SRM, that language to us is not parallel to the language Judge Abrams ruled on in the Maverick deal. Similarly, Clause 14.4 goes on to say that, as a genuine pre-estimate of loss, the prime broker's liability to the counterparty shall be determined based only upon the market value of the relevant cash or securities as at the date of the discovery of loss. And last, I made a whole argument of what it meant to discover your loss, and there was a debate back and forth whether that meant when you could actually quantify down to the detail or simply knew that you were going to have a loss.

THE COURT: Well, I mean, your construction foots more with the distinction between a claim being contingent

versus not. Your construction of the discovery of loss, as opposed to the loss, coincides with the notion that it's a moment in time when there are no impediments to enforcement.

MR. LEVINE: I think it's parallel.

THE COURT: Parallel?

MR. LEVINE: I'm not sure I really agree that it's the same thing.

THE COURT: No, not the same thing.

MR. LEVINE: Okay, okay.

THE COURT: But a parallel.

MR. LEVINE: I agree there's definitely a parallel there, and obviously, we argued that that had to be before they sent notice of default and the termination notice in early November of 2008. But again, for this point of this piece of today's appearance, none of that language was language before Judge Abrams.

THE COURT: Yeah.

MR. LEVINE: And then finally, we have Clause 14.3, which is a little bit closer, but broader than the language in the Maverick PBA. It precludes any recovery around for damages arising directly or indirectly from the general risks of investing or investing or holding assets in a particular country, including, but not limited to, losses arising from governmental actions and market conditions affecting the orderly execution of securities transactions

or fell (ph) in the value of the assets. Now, again, we had an argument in SRM as to whether that applies or not, but for this moment, my point is simply that --

THE COURT: Right.

MR. LEVINE: -- that wasn't language that Judge Abrams addressed.

THE COURT: So just to try to distill what you're saying, so there's kind of headline bases for Lehman's position that these claims ought to be dismissed, and the headline bases that would apply across the board are the waiver of reliance, if you will, on the corporate resolution/guarantee and then the application of these exculpation provisions apply across the board.

MR. LEVINE: Right, right.

THE COURT: Right?

MR. LEVINE: And then the value -- and they'd issue for --

THE COURT: Right. And then separately, with respect to the segregated assets claim, notwithstanding Judge Abrams' ruling in Maverick, first choice 562 in no event, anything other than 502 and certainly not settlement date and therefore, no segregated assets claim.

MR. LEVINE: Perfect, Your Honor. Thank you.

THE COURT: Right? And then with respect to lost opportunities claim, that's covered by the headline rulings,

as well as by the concept that either under British law or under U.S. pleading law, Iqbal-Twombly, no claim has been stated, nor could any claim be stated for lost opportunities, because too speculative, you know, even though there is arguably such a cause of action under U.K. law, it doesn't cover the type of situation here, and also, with respect to the forced sales claim, that the headline grounds would be the basis for Lehman's position that, as a matter of law, that claim can't stand.

MR. LEVINE: Right, right. On a forced sales claim, you're right. It's consequential damages are excluded.

THE COURT: Consequential, right.

MR. LEVINE: And lack of causation.

THE COURT: Okay.

MR. LEVINE: And on lost opportunities, in addition to stating a claim, as a matter of New York law, --

THE COURT: Right.

MR. LEVINE: -- you can't get speculative damages for lost opportunities. You have to tie it to a particular investment that you were going to make like a bond. Say well, you were going to invest in the bond and that paid 5 percent, so you prove it.

THE COURT: But --

MR. LEVINE: Where you're not identifying a

particular investment you would have made. As a matter of New York law, you can't get a claim for lost opportunities damages.

THE COURT: But to the extent that the SRM's position is that that's a U.K. law, cause of action, your position it still doesn't matter?

MR. LEVINE: It still doesn't matter.

THE COURT: Okay, all right. Thank you.

MR. LEVINE: Thank you, Your Honor.

THE COURT: Okay?

MR. STARNER: Thank you, Your Honor. Thank you for the opportunity to come in and speak a little bit about that appeal. Maybe I'll take it in cite in reverse order dealing with the limitation liability provisions and then talk about Section 562.

THE COURT: Sure.

MR. STARNER: Because I actually think the limitation liability provisions are a little bit easier. If you recall, we were here last year, and it was the debtor's position that the language in both PBAs, SRM's and Maverick, were effectively the same. Now, they've obviously taken a slightly different position. They argued, at that time -- and I have a chart, where they obviously said look, yes, the language is different, but basically, it's about the same. So if you dismiss the Maverick claim on the basis of the

exculpation provisions, then you should also dismiss SRM's.

Now, given the District Court's decision, --

THE COURT: But the District --

MR. STARNER: Yes.

THE COURT: I agreed with that. Well, in Maverick, I said the exculpation applies. Judge Abrams disagreed, but what they're saying now is it kind of doesn't matter, because the exculpation version here is even broader/more like M.F. Global than that. So it kind of -- what they're saying is that there's nothing in Judge Abrams' decision, were I to apply it, that strengthens your argument here.

MR. STARNER: Okay. I'll just point out the fact in that point in time, they were saying look, it's very similar. Now, they're saying now that we have a decision from the District Court saying that these limitation liability provisions do not apply, now the language is a little bit different. That's all I'm saying.

THE COURT: Okay. But I mean, --

MR. STARNER: And then let's talk about the decisions.

THE COURT: But I can read it, right?

MR. STARNER: Yeah, absolutely, absolutely, Your Honor.

THE COURT: I mean, I can determine for myself if

it's broader or not.

MR. STARNER: And from my reading of the District Court's ruling, Your Honor, --

THE COURT: Yes.

MR. STARNER: -- I think the headlines are pretty clear. It's that, if these limitation liabilities provisions don't specifically reference filing for bankruptcy, then the plan reading these provisions should not be read to exclude damages premised on the filing for bankruptcy. So in other words, the Court ruled that, in effect, there was no reference to, you know, filing for involuntary -- sorry -- a voluntary proceeding, either Chapter 11 or U.K. Administration, then the plain reading of that provision should not preclude damages premised on that.

THE COURT: Well, I think the District Court went a little bit further and expressed the view that the purpose of the guarantee was to protect against the filing of bankruptcy.

MR. STARNER: I think that was a gloss on the language of the provision, but, yes, Your Honor, the guarantee was also there as a backstop to protect against that precise occurrence. All I say is in this instance here, with the language of the provisions in SRM's PBA, there's also no reference specifically to the filing of bankruptcy.

THE COURT: If I were to agree with you, though, that still doesn't get you out of a problem with respect to the limitation on consequential damages, which is a general limitation.

MR. STARNER: And I'll get to that in a moment, but let's start with the 14.4.

THE COURT: Uh-huh.

MR. STARNER: And this is where it talks about basically that the -- well, back up for a moment. Sorry, Your Honor. Let's start with 14.3, because there that's a more general reference to a limitation on liability where --

THE COURT: Right.

MR. STARNER: -- general risk is investing. And then they talk about the risks of investing or holding assets in a particular country, and I think, just based on the plain reading of those terms, particularly given Judge Abrams' decision, that that can't be read to preclude the claim premised on the bankruptcy filing here of LBIE.

THE COURT: Why?

MR. STARNER: Because there's no reference there to the filing for bankruptcy. All it says is the general risks of investing, and the general risks of investing, too, does not --

THE COURT: Or. It says the general risks of investing --

MR. STARNER: Or. And then B is investing or holding assets in a particular country. So there's nothing particularly unique about a voluntary proceeding in whatever country you may be in. So I think a plain reading of that would refer to something unique to a particular country and investing in a particular country.

THE COURT: Okay. I think you're making that up, but be that as it may, but then you get to 14.4.

MR. STARNER: Okay.

THE COURT: Supposing I could agree with you on 14.3, hypothetically, --

MR. STARNER: So getting to 14.4, Your Honor, --

THE COURT: Right.

MR. STARNER: So starting with the first provision there, that they're only liable for gross negligence, fraudulent, or willful default or breach. That is what SRM has alleged here. So they have alleged a grossly negligent, fraudulent, or willful default or breach of this agreement, and that's our allegation, Your Honor.

THE COURT: Okay. But then you have to --

MR. STARNER: It's backed up by the fact that --

THE COURT: -- word and.

MR. STARNER: And then and. And then it gets to the part while, the parties agree that as a genuine pre-estimate of loss -- and that talks about --

THE COURT: No, no, no, no, no, no, the second part of Clause 14.4 says, "And precludes damages, based on special circumstances, indirect or consequential losses, or subsequent variances to market values." So even if you hue to Judge Abrams' construction of the exculpation clause, you have an expressed limitation on claims against, under the PBA, for consequential damages, which surely, the lost opportunity and the forced sales are.

MR. STARNER: Let me just make sure I'm following Your Honor. So 14.4 of the agreement --

THE COURT: Yeah.

MR. STARNER: The first sentence of 14.4 refers to the fact that the prime broker shall only be liable to the counterparty to the extent that the prime broker has been grossly negligent, fraudulent, or in willful default or in breach of its duties, as set out in this agreement. Save that nothing in this agreement shall restrict any liability owed by the prime broker to the counterparty under the Financial Services Markets Act of 2000 or the rules and disclaimers." And so, that's the sentence there, and, Your Honor, you were reading from the second sentence, "The parties agree that, as a genuine pre-estimate of loss, the prime broker's liability to the counterparties shall be determined based upon, only upon the market value of the relevant cash or securities as of the date of the discovery

of loss and without reference to any special circumstances, indirect or consequential." So I'd just take that in two pieces, Your Honor.

So the first piece, as I stated, the first sentence there we have alleged that they have willfully and fraudulently and negligently breached --

THE COURT: But it's up to me to determine whether your allegations are legally sufficient.

MR. STARNER: It is, Your Honor. It is.

THE COURT: Okay?

MR. STARNER: And we're happy to talk to that. But then the second piece I think we're focused on here is, while the parties also agree that, as a genuine pre-estimate of loss, they are generally going to be looking at the market value of the relevant cash or securities as of the date of discovery of loss, and that kind of gets back to what that means. What is the discovery of loss?

THE COURT: Okay. I'm asking a much more simple question.

MR. STARNER: Yeah.

THE COURT: Okay? Let me go back to Mr. Levine.

What the provision that cuts off consequential damages?

MR. LEVINE: Well, both 14.3 and 14.4 specifically disallow consequential damages. So in 14.3, it says, below

the A&B, "And such exclusion of liability shall extend without limitation to obligations in tort any indirect, punitive, special, or consequential loss or damage, even if the prime broker was previously informed of the possibility of such loss or damage," and then there's an exclusion for personal injury, but I don't see how it can be broader than that.

THE COURT: Okay.

MR. LEVINE: 14.4 says, in the language that Mr. Starner was just reading, the second sentence, it talks about, "The parties agree that, as a genuine pre-estimate of loss, the prime broker's liability to the counterparty shall be determined based only upon the market value of the relevant cash or securities as of the date of discovery of loss and without reference to any special circumstances," --

THE COURT: Right. So whether or not we agree on the determining date for loss, whether it's the date of the settlement or before, you still don't get to include consequential damages. That's your point, right, Mr. Levine?

MR. LEVINE: That is my point, Your Honor.

MR. STARNER: And I think my response to that direct -- that specific issue is --

THE COURT: Yeah.

MR. STARNER: -- keep in mind that we're talking

about segregated assets. It's specific property. It's collateral in the form of shares.

THE COURT: Yeah, well, I'm not talking about that. I'm talking about the lost opportunities claim and the forced assets claim. Those are claims for consequential damages.

MR. STARNER: And I think there, Your Honor, the argument is under English law, when you have kind of a relationship of trust that we had with our prime broker, that there is an argument that that type of provision would not be enforceable, and that's our argument on the lost opportunities and the forced sales.

THE COURT: So notwithstanding the language that precludes the assertion of consequential damages, you say that, under English law, there's a trust relationship and that that would somehow be out of the realm of a consequential damage?

MR. STARNER: I may have misspoke there. I think there's a slight distinction to be made between the lost opportunities claims and the forced sale claims. Lost opportunities we've talked about fairly at length. The forced sale claim is this idea that, because we were forced to close out our positions, we were forced to sell specific positions we had in order to cover our margin goals. So those are specific sales that we can identify at that time

that -- this is we took -- we sold certain positions at a loss. We were forced to, and so, those are --

THE COURT: But that's a --

MR. STARNER: Yeah.

THE COURT: -- damage that's consequential. The world is divided into two things, damages that are related to the market value of the securities that were not returned and everything else. You divide the world into those two buckets. What you're just describing belongs to everything else.

MR. STARNER: I would argue that's not necessarily consequential. That's a direct result of the breach of the agreement.

THE COURT: Okay. All right. So I think we've covered that point.

So what about the 562 point?

MR. STARNER: Yes, Your Honor, so the 562 -- I think the 2 --

THE COURT: Your argument --

MR. STARNER: Yeah.

THE COURT: -- there is based on some notion that this is not a securities contract, which clearly, it is.

MR. STARNER: Well, I think, Your Honor, the District Court ruled that it's not necessarily as clean as that. You need to look at the context for --

THE COURT: No, she said she --

MR. STARNER: Right.

THE COURT: -- you had to look at the context when you were talking about the termination, and if you read from the District Court's decision -- and I'm happy to do that. Let's see.

(Pause)

MR. STARNER: The language I was looking at, Your Honor, I think it starts on page 6, at the bottom there.

THE COURT: Yeah.

MR. STARNER: And beginning of the top of page 7. And she discusses that the purported damages that Maverick asserted fall outside of the reach of the statute, because the termination that occurred was not of the sort contemplated.

THE COURT: Yes, so what she's talking about there --

MR. STARNER: Yeah.

THE COURT: -- is that it was not a termination by a party. It was a termination pursuant to a consensus, if you keep reading. The settlement agreement represented a consensus.

MR. STARNER: But she also notes that the termination did not cause harm, and she noted that and made that kind of as a relevant consideration of -- or what's the

purpose of the termination. Was it to, in effect, cause harm, I guess, to the estate, thus the Bankruptcy Code should come into play, or not? And I guess, in the context of the mutual agreement determined it as part of a settlement. The conclusion was it wasn't intended to cause harm.

THE COURT: If you look down at the bottom of page 7, --

MR. STARNER: Yes.

THE COURT: She says, "The language is clear that the statute applies when one of the specified participants elects to take one of the unilateral numerated actions in a unilateral fashion." So that's what SRM did. They elected -- you didn't have to, but you did. You elected to terminate the PBA, and the only case that you've cited from the beginning on this is the Moto (ph) case, which is clearly not relevant.

MR. STARNER: But I'd cut this a few different ways, Your Honor. Number one, the guarantee was never terminated. The guarantee was expressly carved out of the settlement. So, one, the guarantee, which is kind of at issue here, was never terminated, number one.

Number two, this is also an issue where -- frankly, it is a question that we have raised with this Court that we don't think Section 562 was intended to apply

extra-territorially, and that's not a question that the District Court addressed. I know it was raised on appeal by Maverick, but it's not something the Court addressed, and obviously more relevant here, when we have the PBA governed by English law and all relevant kind of acts of the parties were happening in the U.K.

THE COURT: But so let's move on 562, and let's go to 502. Your view is that, because your underlying claim against LBIE is governed by U.K. law, the Bankruptcy Code -- all bets are off. Bankruptcy Code doesn't get to have anything to say about when the claim gets calculated.

MR. STARNER: Well, I think when it comes down to -- well, there's a few arguments there, Your Honor. One, that, yes, under U.K. law, we believe that the quantum of our claims should be -- came into play or it was confirmed that the date we settled. Because before that, keep in mind we were seeking recovery of specific property, all the way up until that date of the settlement, and indeed, we understand that there was actually shares to be turned over.

THE COURT: So I've asked you this before, and I'll ask you it again.

MR. STARNER: Okay.

THE COURT: Lehman Brothers wasn't required to hang around the hoop waiting for you to settle your claim. Indeed, you sat around while the value of the securities

continued to increase.

MR. STARNER: Well, I think that's not a fair characterization of what we did, Your Honor.

THE COURT: Well, time went by --

MR. STARNER: Sat around. We submitted (ph) our claim.

THE COURT: And during that time, the value of the securities greatly increased, right?

MR. STARNER: But they could have gone down, Your Honor.

THE COURT: They could have gone down. But if Lehman, if hypothetically, this were not the huge case that it were and Lehman confirmed the plan two months after you terminated the PBA, they would have been entitled to determine the amount of your claim, period. At that point, when you terminated the PBA, the guarantee was not a contingent liability any more. There was no impediment to the enforcement of your claim.

MR. STARNER: Well, I think, from the perspective of seeking turnover of specific property, I agree with you. We were seeking the specific property to be returned to us. And to the extent that he Lehman estate here had the ability to return that property to us, absolutely, we could have sought and received it at that time.

THE COURT: You could have received a claim at

that time for that amount, and you could have then gone out into the market and bought the securities.

MR. STARNER: Well, again, that amount -- it's basically we want that property. I guess there is a world where --

THE COURT: Yes, but if they say we're in administration, we're not allowed to or we can't return the property to you, oh, look, here's the market value of these shares today, here is this amount of money, go out and buy the securities, you would have been completely whole.

MR. STARNER: I don't know the answer to that question, Your Honor, but I do know that that would put us in a very different position than we were in in negotiating our claim against LBIE, or, you know, the primary obligor here.

THE COURT: So your answer is that, for your purposes, Section 502 and/or 562 are irrelevant and that you -- it was perfectly fine for you to proceed along for years and years and years and then, in disregard of 502 or 562, allege a please give me more claim against Lehman?

MR. STARNER: I don't --

THE COURT: I just don't understand --

MR. STARNER: Yes.

THE COURT: I just don't understand how you get to the other meaninglessness of 502 and 562 when you're seeking

to enforce a "guarantee," quote, unquote, that's governed by U.S. law.

MR. STARNER: But it was a guarantee that was guaranteeing our ability to recover specific property in the form of our collateral, and so, --

THE COURT: When you terminated, they told you that you're not getting it back, and your view in your papers is that, well, they could have changed their mind at any time. You haven't answered my question. If two months after you terminated the PBA and Lehman made a motion to dismiss or estimate your claim, what would your answer have been? Lehman just has to sit in bankruptcy until some day, you settle and your claim is liquidated? That's just not the law.

MR. STARNER: Well, we would have had that fight as to what would be the appropriate valuation of that claim at that time, and we would have had that fight, and we would have looked at that time what --

THE COURT: But you can look at that --

MR. STARNER: -- what would have been --

THE COURT: You can do that now, because we know what the date is.

MR. STARNER: But the property is still and was still available for years afterwards, and we actually still wanted to receive it. So it's kind of an artificial

exercise, because it isn't as if there was a requirement for us to liquidate our claim at that time as we were pursuing our rights against LBIE and reserving our right to proceed against the guarantor at the same time, which was within our rights and they were on notice of, and keep in mind, too, this is a situation where you have relationships governed by English law. You had a relationship of trust, which I think plays an important part in all of this.

THE COURT: You're --

MR. STARNER: I'm circling back to English law. Why? Because it's a very relevant aspect of our claim, Your Honor, and so, I know that you want to look at the 502 or 562, but at the end of the day, English law kind of governs.

THE COURT: At the end of the day, what you're saying is that, because the PBA is governed by English law, you get to render irrelevant what the Bankruptcy Code says about the measuring dates for claims asserted in a U.S. bankruptcy.

MR. STARNER: I would frame it a little bit differently, Your Honor. What I would say is the U.S. Bankruptcy Code respects the law the parties agreed would govern their relationship.

THE COURT: And you're saying that, as applied in this case, that would have meant that Lehman would have had to sit around and not be able to liquidate your claim,

because you didn't know, and I don't understand how that could possibly be the law.

MR. STARNER: Well, I think the law does very clearly say that, under the Bankruptcy Code, they should respect the law that governs a contract relationship. So the fact that we had a U.K.-governed contract with LBIE, I think that is something the Code would recognize and enforce. And then if that then gave us the right to proceed against LBIE in the way we did to recover that specific property, under various theories, including the theory of trust, the trust relationship that was formed, then whenever we ultimately got that property, --

THE COURT: You didn't get the property.

MR. STARNER: But we may have, but ultimately, we didn't. You're absolutely right. And so, at that point in time when we did not, that's when our contingent claim became basically limited.

THE COURT: No, your contingent claim became non-contingent when LBIE told you we're not giving you back the property. At that point, it was not contingent any more. There was no impediment to enforcement. At that moment, if you had sued LBIE, which you couldn't, but if you had sued LBIE, the answer wouldn't have been it's not right, we still -- they told you, "We're not giving you the shares back."

MR. STARNER: Well, actually, that's not entirely

accurate, Your Honor. The record shows they did not say that until basically the date we settled. It's my understanding that, in fact, there was a lot of back and forth where they were saying we don't know where your property is.

Let's find that property. Give us more time and maybe with a different entity. We're not sure where it went. And ultimately, at the end of the day, you know, you're right. We don't have it. We've got to pay you cash, and that was around the settlement time, not before then.

THE COURT: Thank you.

Mr. Levine, you want to respond?

MR. LEVINE: Yes, Your Honor. I mean, dealing with that last point, they did send a letter in September of 2015 demanding return of the assets. When they didn't get it back, they sent a notice of default. Sent the letter, and then they called that a termination event, an event of default and terminated, and in the English case that they cited -- it's actually -- I'm reading a quote from page 16 of our reply brief, but it's from the in re: Lehman Brothers International Europe case, paragraph 36 of our reply brief.

"The obvious risks to Clause 13.2," which is the clause in this PBA, -- "would convert a proprietary claim to a breach of contract claim has to date been enough to deter

the parties before that Court from serving termination notices or, for that matter, default notices on LBIE." So according to the English Court, its understanding was the decision they made, which most LBIE counterparties didn't do, to serve a termination notice, in fact, gave them only a contract claim, and that's in November of 2008, the termination date on which their segregated assets were worth $34 million. So I think it's clear that, as a matter of English law, they did not have -- Your Honor's entirely correct. They didn't have this continuing expectation or right to return of the assets. They had a contract claim, even under English law, putting aside the fact that this is a guarantee claim, under the Bankruptcy Code.

And as Your Honor observed the first time we were here, under Ivanhoe and as you were just kind of getting to it before, a guarantee claim was ripe at the moment they alleged a breach by the primary obligor, and they alleged that when they served -- they declared an event of default. And if, as you said, we had had an incredibly fast case where LBHI was paying out in the months after its bankruptcy filings, the guarantee claim would have been 100 percent of what was owed by LBIE, but it would have measured either as of the 562 date or the petition date. They wouldn't have had to wait to settle with LBIE to collect from us.

THE COURT: Right. Well, if 562 applies, then

it's an exception to 502.

MR. LEVINE: Exactly.

THE COURT: The default is that 502 applies.

MR. LEVINE: Right, but either one --

THE COURT: Right.

MR. LEVINE: Obviously, you know, -- does Your Honor have the chart we handed the first time?

THE COURT: Yeah, I do.

MR. LEVINE: If you look at the very bottom line of that, --

THE COURT: The summary of key provisions?

MR. LEVINE: No.

THE COURT: Or the --

MR. LEVINE: No, the dollar chart, the one-pager.

THE COURT: Yeah, okay. Right.

MR. LEVINE: The top half is a different claim.

THE COURT: Yes.

MR. LEVINE: If you look at the very bottom, --

THE COURT: Right.

MR. LEVINE: -- it's the segregated assets, which they allege in their response, in paragraph 26, are these Virgin Media shares, which are where the 264 million comes from, because the Virgin Media shares, because of the takeover, were allegedly worth that on the settlement date. If you look at the bottom line, while they were worth the

264 on the settlement date, --

THE COURT: Yep.

MR. LEVINE: -- on the petition date, they're only worth 51.9 million and 34 million, and they ultimately recovered, and god bless them. They got $220 million on that claim from LBIE, but this is a guarantee claim. They were entitled, under that guarantee claim, if it had been processed in this bankruptcy, very quickly, either 52 million or 34 million. And when they ultimately recovered, $220 million from LBIE, we would have been subrogated, and they would have had to pay us back.

THE COURT: Right.

MR. LEVINE: But that's how it would have worked.

THE COURT: Right.

MR. LEVINE: There was no contingency here. There's a few other points, Your Honor. As Your Honor also kind of hinted at while Mr. Starner was arguing that they alleged gross negligence, willful default or fraud, they don't. I mean, willful default they've kind of argued, but they haven't alleged the elements of that. I don't think they've ever really alleged fraud.

That they claim is that there were certain breaches. One is a breach of some oral side agreement after the PBA was signed that LBIE would not rehypothecate their securities without giving them notice. So at most, they

have a breach of what may be or may not be an enforceable oral agreement that wasn't part of the PBA. The PBA hadn't gave them the right to send a notice saying don't rehypothecate.

It didn't do that. They claim that they had a side agreement that LBIE would not rehypothecate without giving them notice. I don't know whether that exists, but that's, at most, a breach of contract claim, and plain and clear there was a contract there.

They also allege gross negligence and rehypothecating. But again, no elements of the negligence claim are ever alleged.

And willful default -- their main breach of contract claim is the failure to return the assets, but as we know, administrators were appointed. They obviously had an obligation, under the governing regulations in U.K. and Wales to marshal assets and determine claims. Moreover, in the PBA itself, it expressly provides that, in the event of an event of default -- so I'm looking at Clause 7.2 of the contract, which says, "The prime broker acting in good faith and in commercially reasonable discretion shall not be required to make a payment or delivery, under Clause 7.1, a, an event of default or potential event of default has occurred and is continuing."

In their termination notice, they alleged a

potential event of default, and indeed, filing for administration is defined as an act of insolvency, in the PBA, which is an event of default. So any obligation to return the assets, as the judge in that LBIE case I was just referring to recognized, terminate any obligation to return assets. At that point, they just had a contract claim.

THE COURT: Okay.

MR. LEVINE: Okay?

THE COURT: All right.

MR. LEVINE: And obviously, the last point I wanted to make is we're not arguing 562 applies extra-territorially. We're arguing it applies to the Lehman Holdings Chapter 11 case in this court in New York City.

THE COURT: All right.

MR. STARNER: If I may, just two or three points there?

THE COURT: Yep.

MR. STARNER: The last first. I mean, their argument applies to a contract governed by U.K. law that was executed by parties in the U.K., which the damages and all the injury we're alleging all happened in the U.K.

THE COURT: You're seeking to recover, in this court, a claim on what you say is a U.S.-based guarantee.

MR. STARNER: Yeah, but they're arguing that 562 applies to our PBA.

THE COURT: Okay.

MR. STARNER: The guarantee is a different contract, was never terminated, Your Honor and arguably, is not a securities agreement. So if they want to -- they can't have it both ways. You're either talking about the PBA or the guarantee.

THE COURT: Is it your view that the corporate resolution, under 562, is not a securities agreement or related to a securities agreement?

MR. STARNER: My argument is that it was not terminated. We did not terminate the guarantee, Your Honor. And so, if you apply the District Court's ruling about when 562 applies, it applies when there's a termination event. The guarantee was not terminated here. Okay.

THE COURT: Okay, go ahead.

MR. STARNER: And, number two, we're going to talk about the allegations of willful breach negligence, and I just refer the Court to our initial pleadings here when we put in our -- I think it was the response to the objection --

THE COURT: Well, I'm not interested in your response.

MR. STARNER: Okay.

THE COURT: You can read to me what you think the allegations are.

MR. STARNER: Oh, certainly, Your Honor. The allegations are, I guess, two parts I would highlight. One, at the time the PBA was entered into, there was indeed representations made about the fact that collateral would not be rehypothecated. I can't even say it.

THE COURT: Rehypothecated.

MR. STARNER: Rehypothecated. Excuse me, Your Honor. That it would be in the segregated and preserved for SRM's benefit, number one.

Number two, in the context of the bankruptcy filing, there was further representations made that the assets would be returned to SRM, which were also, you know, alleged in our papers.

And then finally, just on the point about the termination of the PBA, what we highlight -- and, you know, it's paragraph 23 of our submission, but what we highlight is that we received a notice from LBIE in October of 2008. This was before the PBA was terminated. That notice was, in effect, totally erroneous, said that we were a debtor to the tune of $108 million, and thus, prior to all our understanding of what the parties' arrangement was, we're now being accused by LBIE that we're exposed now to $110 million almost. So basically, it was a reaction to that, what was, in effect, a misrepresentation by LBIE that SRM took steps to terminate the PBA.

Now, under U.K. law -- now, we put in submissions from an expert, and I guess I'd refer -- I think we talk about this in paragraph 35 and 36 of our submission. While, under the U.K. law, generally speaking, a counterparty to a contract generally cannot benefit from its own misconduct when it comes to something like this, where we terminated -- our termination was premised on their own misconduct.

THE COURT: Okay. Give me one minute, please.

MR. LEVINE: So, Your Honor, again, --

THE COURT: Okay, just give me one second.

MR. LEVINE: Sorry, sure.

(Pause)

MR. STARNER: Sorry, it's actually page 35. Excuse me.

THE COURT: Okay.

MR. STARNER: And it's paragraph 80 and 81. We just say it's a matter of English law that the idea of the termination of the PBA --

THE COURT: The contract (ph) thing about 562 -- I thought your argument was that 562 doesn't apply, because the corporate resolution is not a securities contract. And now, what you're saying is that 562 doesn't apply, because the termination of the PBA did not terminate.

MR. STARNER: Your Honor, we have both arguments. We indeed believe the guarantee is not a securities

agreement.

THE COURT: Okay.

MR. STARNER: It's not specifically talking about any securities agreement. It's a general guarantee, Your Honor. It's a global guarantee. They do not specifically --

THE COURT: Of the securities contract?

MR. STARNER: But there's no reference there. It's a general obligation for them to backstop the PBA. It does not refer to securities agreements, Your Honor, but in the context of the Maverick appeal, the question is what impact does that appeal have on our 562 position, and I think the Court didn't necessarily address squarely the question of whether or not the guarantee that we had -- that was not before the Court, whether or not that was a securities agreement, but the Court did rule that -- and you, in fact, would look at a termination event. And here, with the global guarantee, there was no termination event. We didn't terminate that. Quite the opposite. We expressly carved that out of our settlement with LBIE.

THE COURT: Well, Mr. Levine, can you address that point?

MR. LEVINE: Yes, on --

THE COURT: It's new to me. Maybe I've missed it, because we've argued this so many times.

MR. LEVINE: Yes, we have done that, Your Honor. So first of all, under the definition of securities contract, --

THE COURT: Right.

MR. LEVINE: -- a guarantee of a securities contract is a securities contract.

THE COURT: Right.

MR. LEVINE: So either this guarantee has nothing to do with this or --

THE COURT: Okay. So --

MR. LEVINE: -- or it's a securities contract.

THE COURT: -- I believe that that is correct and that Judge Abrams didn't say anything inconsistent with that.

MR. LEVINE: Right.

THE COURT: But now, there's a new argument --

MR. LEVINE: Right.

THE COURT: -- that the termination of the PBA does not trigger 562.

MR. LEVINE: Well, and let us look at the language of 562. The heading, which under your second interpretation, can be looked at if a contract -- if a statutory provision is ambiguous -- is timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, where you

purchase agreements, and master netting agreements. So it's timing of damage measurement. That's all 562 is about, and going down to the halfway through, if a forward contract merchant, dot, dot, dot, --

THE COURT: Right.

MR. LEVINE: -- financial participant, master netting agreement participant, or swap agreement liquidates, terminates, or accelerates such contract or agreement, --

THE COURT: That's the PBA.

MR. LEVINE: That's the PBA. They terminated the agreement.

THE COURT: Right.

MR. LEVINE: So it doesn't say that it has to be -- if your claim is against the guarantor, it has to be the guarantee that's terminated. It's simply proposing an alterative -- not proposing. It's an exception, as Your Honor pointed out, to 502, and it's simply saying that, where you have one of these types of agreements that's terminated, that's the measurement date. And that had to do with all kinds of policies about the derivatives world, but none of that is relevant.

THE COURT: Right, right.

MR. LEVINE: Because it doesn't matter, in our view, whether it's 502 or 562(a).

THE COURT: Okay.

MR. LEVINE: We think 562(a) clearly applies, but either way, it's one or the other. That's when you measure the guarantee claim.

The other thing I wanted to quickly go through, Your Honor, is their assertion that somehow, their termination of the PBA was based on wrongdoing. I mean, wrongdoing to me suggests something that's immoral, criminal.

THE COURT: Something Madoffian?

MR. LEVINE: Right. This was --

THE COURT: Right? Not went into administration and then the administrator said he's not going to -- can't return your shares.

MR. LEVINE: Right, here we have -- and this is the thing, because they put it before the Court. So they're admitting exhibits to the declaration of Jonathan Wood (ph). And Exhibit --

THE COURT: I'm not smart enough to come up with the specific examples, but this type of allegation has arisen on the LBI side of the case from time to time.

MR. LEVINE: Right. So --

THE COURT: So --

MR. LEVINE: -- on Exhibit Jonathan Wood, JW-2, is a letter from Clifford Chance (ph), as counsel for SRM. They demand, on page 2, "Segregated assets are the property

of SRM. We hereby request Lehman immediately to return or procure the return of the segregated assets to the following account of SRM." So on September 19th, 2008, they sent a demand to LBIE for return of what they say are the segregated assets.

Then if we turn to Exhibit JW-5, this is another letter from SRM's counsel. This is actually from SRM. I apologize. Dated 6 November, 2008, and it says, "Dear Sirs, default notice under International Prime Brokerage Agreement."

And it says, "This letter constitutes a default notice under the P.B. Agreement by virtue of the appointment of administrators to Lehman on 15 September, 2008, an act of insolvency, as specified in Clause 12.1(d) of the P.B. Agreement has occurred and is continuing in relation to Lehman. We hereby notify you that we are treating that event as an event of default for purposes of the P.B. Agreement." So they are sending a default notice based on LBIE filing for administration.

Then the next exhibit, Exhibit JW-6 -- this is also from SRM dated November 6th, same date, and it's headed Termination Notice Under International Prime Brokerage Agreement. "We write in connection with the International Prime Brokerage Agreement dated 9 May, 2008 between LBIE and SRM." I'm summarizing there.

"We refer to Clause 13.1 of the P.B. Agreement and our first letter and default notice of today, and we hereby give notice to terminate the P.B. Agreement with effect from 6 November, 2008." So clearly, the record shows these are the documents they put in the paper. They made a demand for return of the assets, and they allege elsewhere they didn't get them. They sent a default notice, and they sent a termination notice. That's the record.

THE COURT: Okay. All right. Well, this has been helpful clarification and also as a refresher. I'm going to be dismissing the entirety of the proof claim on -- depending upon which particular bucket of claims, segregated assets, lost opportunity, forced sales, there are going to be multiple bases on which I'm going to dismiss each of those claims. We will, in a written opinion, work through it all.

I think that LBHI has convinced me on the non-reliance point. I'm convinced on the applicability of the various aspects of the exculpation clause, including the limitation on consequential damages. I think that the segregated assets claim cannot be sustained. I think 562 applies.

And in any event, it almost doesn't matter, because 502 applies provisions of the Code, notwithstanding the fact that the underlying obligation is U.K. denominated.

It simply doesn't matter. This is the way it works in the U.S. Bankruptcy. Despite the efforts throughout, which I understand, to create issues of fact where I believe there are none, I don't believe there are any issues of fact that are inconsistent with my ruling, as a matter of law, with respect to the sufficiency of the pleadings and with respect to the viability of the claims. So the entirety of the claim is going to be dismissed.

It's going to take a while to write this. We have a lot of other things going on. So I thought I owed it to you to give you a decision. That's the decision. Details to follow in due course. You know, optimistically shoot for some time in January, but we have a very major trial coming up, and I just don't know that we're going to get to it in that time frame.

If, by any chance, the parties want to start talking to each other and you're approaching a settlement, please send us a missive, and we'll put pencils down and, you know, be delighted to hear that you settled. But look, this has been before me now for longer than I care to think about it. We had a number of rounds. We took a time out for you to have settlement discussions. It's too bad those didn't result in a settlement.

And then we had the additional Maverick decision. So now, this was, I believe, entirely right for me to tell

you what my thinking is. That's what my thinking is, and we'll publish a decision when we publish a decision, and we'll trust that you'll let us know if you come to an amicable resolution. All right?

MR. LEVINE: Thank you very much, Your Honor.

MR. STARNER: Thank you, Your Honor.

THE COURT: Okay. Thank you. Happy Holidays.

MR. LEVINE: We appreciate it.

MR. STARNER: Happy Holidays to you.

THE COURT: Thank you again for coming in today. I appreciate it.

(Whereupon, these proceedings were concluded at 3:57 PM)

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RULING

C E R T I F I C A T I O N

I, Nicole Yawn, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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